SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-204

STATE OF FLORIDA,

Petitioner,

vs.

MALVIN ENGLANDER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

On July 2, 1969, the Criminal Court of Record, in and for Dade County, Florida, entered its Order dismissing a Criminal Information filed against the Respondent,

MALVIN ENGLANDER, a duly elected member of the City Council of the City of Miami Beach, Dade County, Florida. The Court ruled that the Respondent's purported waiver of rights was void in that it was not signed freely and voluntarily, but rather, it was signed by the Respondent because of the provisions of Sec. 8.02 of the Charter of Metropolitan Dade County, which provided that if he, as a municipal officeholder, having been called to appear before the Dade County Grand Jury, refused to appear and waive immunity, he would be removed from office (App. E of Petition). The Court further ruled that since the waiver of immunity was involuntary and since the Respondent testified concerning matters encompassed within the provisions of the Immunity Statute 932.29 (App. F of Petition), the Respondent was immunized from prosecution (App. A of Petition).

On June 16, 1970, the District Court of Appeal of Florida, Third District, reversed the Order of the Trial Court and directed that the Information be reinstated. The Opinion of the District Court of Appeal is reported at 237 So.2d 193 (App. B of Petition).

On April 7, 1971, the Supreme Court of the State of Florida granted the Respondent's Petition for Writ of Certiorari, reversed the Order of the District Court of Appeal, and reinstated the Order of the Trial Court dismissing the Information. The opinion of the Supreme Court of the State of Florida is reported at 246 So.2d 746 (App. C of Petition).

Petitioner's Petition for Re-Hearing was denied on May 12, 1971 (App. D of Petition).

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under Title 28 United States Code, Section 1257 (3). However, the Petitioner nowhere draws in question the validity of a treaty or statute of the United States or the validity of a statute of the State of Florida on the ground of its being repugnant to the Constitution, treaties or laws of the United States (It would certainly be an anomalous situation for the Petitioner to urge that one of its own statutes is unconstitutional!). Nor does the Petitioner assert any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. There simply is no title, right, privilege or immunity which the Petitioner, the prosecuting authority, can claim. Those are for individuals, not for a state. And, the Petitioner has cited absolutely nothing to the contrary to uphold its claim that the jurisdiction of this Court should be invoked in this matter.

Furthermore, the Petitioner has not complied with Rule 19 of the Rules of the Supreme Court of the United States, in that the Petition for Writ of Certiorari does not set forth any special and important reason for the granting of the Petition; nor does it contend that the Supreme Court of the State of Florida has decided a Federal question of substance not heretofore determined by this Court; nor does it contend that the Supreme Court of the State of Florida has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

Whether the Supreme Court of the State of Florida correctly held that the Respondent, MALVIN ENGLANDER, a Councilman of the City of Miami Beach, Dade County, Florida, (a municipal officeholder governed by Section 8.02 of the Metropolitan Dade County, Florida, Charter) was immunized from prosecution by reason of his testimony before the Dade County Grand Jury, which was made under compulsion and in violation of his Constitutional right against self-incrimination, because he was forced to either waive immunity and testify, or suffer the loss of his public office.

CONSTITUTIONAL PROVISIONS, STATUTE, AND METROPOLITAN DADE COUNTY CHARTER PROVISION INVOLVED

The pertinent portions of Amendments V and XIV to the Constitution of the United States are set forth in the Petition at Page 4. The Florida Immunity Statute is set forth in the Petition as Appendix F. The Dade County Charter provision requiring municipal officeholders who are called before a Grand Jury to either sign a waiver of immunity or be removed from office is set forth in the Petition as Appendix E.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is basically correct. However, there are some inaccuracies which the Respondent feels should be rectified.

On April 9, 1969, the Respondent, MALVIN ENGLANDER, a City Councilman of the City of Miami Beach, Dade County, Florida, was called, by the Assistant State Attorney, to appear before the Dade County Grand Jury (Tr. 10). The Section of the Metropolitan Dade County Charter which concerns the waiver of immunity by public officials and the penalty provision for failing to waive such immunity and testify is as compelling as a subpoena since the Section itself does not use the word *subpoena* but refers to any public official who is *called* to testify (App. E of Petition). Thus, Petitioner's assertion that Respondent was not subpoenaed to appear before the Grand Jury (Page 5 of Petition) is meaningless. Additionally, Petitioner's statement that Respondent did not assert in his Motion to Dismiss that he was not required to sign a waiver of immunity (Page 5 of Petition) is inaccurate. The whole point is that Respondent was required to appear and testify before the Grand Jury and waive immunity because of the job forfeiture provision contained in the Metropolitan Dade County Charter, Section 8.02 (App. E of Petition), and this was set forth in Respondent's Motion to Dismiss in the Trial Court (Tr. 144-147). At the time of his appearance before the Dade County Grand Jury, the Respondent was aware of the provisions of Section 8.02 of the Metropolitan Dade County Charter, which required County and City officials within Dade County to waive immunity, and testify, when called before the Grand Jury, or forfeit their positions (Tr. 13-14). The Respondent, MALVIN ENGLANDER, appeared and testified before the Grand Jury, and signed a waiver of immunity, because he knew that if he did not do so, he would lose his position as City Councilman of the City of Miami Beach, Dade County, Florida (Tr. 20-22, 26). The Trial Court, in ruling that the Respondent's waiver was

involuntary, and thus that he was immunized from prosecution, followed **Garrity v. New Jersey**, 385 U.S. 493 (1967) and the Florida Immunity Statute, Section 932.29 of the Florida Statutes (App. A of Petition). The Supreme Court of the State of Florida, in reinstating the Trial Court's Order, also relied upon **Garrity v. New Jersey**, supra, and the Florida Immunity Statute.

ARGUMENT

It is clear that neither a State nor a County can use the threat of discharge to compel a public official or an employee to waive his Fifth Amendment right. **Garrity v. New Jersey**, 385 U.S. 493 (1967). When a public official is placed in such a position, he is forced to make "a choice between the rock and the whirlpool." In **Garrity v. New Jersey**, supra, this Court stated that:

> "Where the choice is 'between the rock and the whirlpool,' duress is **inherent** in deciding to 'waive' one or the other." (Emphasis added)

This Court concluded that:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice . . . is 'likely to exert such pressure upon the individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions."

The purported waiver by the Respondent could not possibly have been voluntary. The record amply reflects that the Respondent was given the choice "between the rock and the whirlpool". Metropolitan Dade County, Florida, had the aforementioned waiver of immunity provision in its Charter (App. E of Petition), which provided that if the Respondent, a City Coucilman of the City of Miami Beach, Dade County, Florida, having been called before a Grand Jury to testify, refused to sign a waiver of immunity and testify, he would be removed from office. The threat of loss of office dictated the involuntary nature of the waiver which the Respondent signed. When testifying at the hearing on his Motion to Dismiss, the Respondent stated that he agreed to sign a waiver of immunity and testify before the Grand Jury because he was aware of the existence of the aforementioned Charter provision (Tr. 13-14) and he knew that if he did not waive immunity and testify before the Grand Jury he would lose his public office (Tr. 20-22, 26).

Additionally, as the Trial Court noted (Tr. 159), the purported waiver, itself, is a contradictory instrument since it sets out in its first paragraph that the Respondent, "... having been requested by the Dade County Grand Jury to come before them and testify ...," and in the next paragraph sets out that the Respondent appeared before the Grand Jury freely and voluntarily and of his own free will and accord.

Moreover, it is immaterial whether the Respondent appeared before the Dade County Grand Jury as a result of having been served with a subpoena or whether he appeared in response to a telephone call form a person authorized by law to command his appearance. The Metro-

politan Dade County Charter provision concerning the waiver of immunity by public officials and the penalty provision for failing to waive such immunity and testify (App. E of Petition) is as compelling as a subpoena since the Charter provision itself does not use the word "subpoena" but refers to any public official who is *called* to testify. The Petitioner cannot do indirectly what it cannot do directly.

Accordingly, the Supreme Court of the State of Florida was correct in ruling that, since the waiver was involuntary, the Respondent is immune from prosecution for the charges laid in the Information against him since the said charges are encompassed within the provisions of Section 932.29 of the Florida Statutes (App. F of the Petition), Florida's Immunity Statute.

The Supreme Court of the State of Florida, in its decision, has not created a "super-class" of citizens. Rather, what it has done, is to properly follow this Court's ruling in **Garrity v. New Jersey**, supra, that public officials and public employees are entitled to the same Constitutional rights as are all other citizens, and are not second-class citizens. As this Court said in **Garrity**:

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

Petitioner's contention that, because Section 8.02 of the Dade County Charter, the waiver of immunity and job forfeiture Section (App. E of Petition) was of doubtful Constitutionality, the Respondent's waiver was voluntary, is totally untenable. The Petitioner first utilizes

a law of one of its political subdivisions to coerce a waiver of Constitutional rights, and then it turns around and asserts that, since the law might have been unconstitutional, it was unenforceable, and Respondent's waiver was voluntary. The Petitioner cannot have it both ways. The point in question is not the Constitutionality of the Charter provision, but, rather, the voluntariness of Respondent's waiver. As this Court stated, in **Garrity v. New Jersey**, supra, the importance of the forfeiture of office provision was its effect on the voluntariness of the waiver of the right against self-incrimination. As this Court stated, at p. 496:

> "... The only bearing it (the New Jersey forfeiture-of-office statute) had was whether, **valid or not,** the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other, was 'a choice between the rock and the whirlpool' which made the statements products of coercion in violation of the Fourteenth Amendment.
>
> * * *
>
> "We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions." (Emphasis and parenthesis supplied.)

Additionally, it is totally unconstitutional for police officers to threaten physical harm to a suspect if he does not confess to a crime. However, it would be absurd to contend that a confession obtained under those circumstances was voluntary, because the actions of the police

officers were unconstitutional and unenforceable. In **Spevack v. Klein**, 385 U.S. 511, this Court ruled that the Fifth Amendment right was available to attorneys in Bar disciplinary proceedings. If, in a Bar disciplinary proceeding, the Bar required an attorney to waive his right against self-incrimination, or be disbarred, could anyone seriously contend that the waiver was voluntary? As this Court so properly stated in **Gardner v. Broderick**, 392 U.S. 273 (1968), at p. 279:

> "... **Petitioner could not have assumed — and certainly he was not required to assume — that he was being asked to do an idle act of no legal effect.** In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of an employment . . ." (Emphasis added)

Finally, Petitioner is mistaken in its contention that the Supreme Court of the State of Florida ruled that the Respondent was immunized from prosecution solely because the Respondent's waiver was involuntary and coerced. Respondent is immunized from prosecution because, after having been forced to sign a waiver of immunity, he was required to testify before the Grand Jury concerning the charges set out in the Information filed against him, and the said charges are encompassed within the provisions of Section 932.29 of the Florida Statutes (App. F of Petition), the Florida Immunity Statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondent in Opposition, on Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, was mailed this _____ day of August, 1971, to the following:

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